IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,

Defendants.

ELINE'S INC.,

Petitioner and Appellant Below

vs.

GAYLORD CONTAINER CORPORATION,

Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The rulings of the District Court, Judge F. Ryan Duffy presiding, made during the trial in respect to the claim of so-called "ready-to-go" value appear on pages R 130-133, 162-163, 163-167, 168, 240, 250-253, 328-332, 531, of the record; in respect of the inapplicability of the sale clause on page 332, 530 of the record; and in respect of the inapplicability of the condemnation clause on page 530 of the record.

The majority and minority opinions of the Circuit Court of Appeals for the Seventh Circuit were field March 5,

1945, and appear at page 637 of the record. They are reported in 148 Fed. (2) Adv. Op. 33.

JURISDICTION

This has already been stated in the petition at page 2, which is hereby adopted and made a part of this brief.

SUMMARY STATEMENT

The essential facts of the case are set forth in the accompaning petition for writ of certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

A. In allowing as part of just compensation where real estate (an entire leasehold) only is condemned by the United States so-called "ready-to-go" value, which is a value over and above the fair market value of the real estate, and which is based upon what an alleged purchaser of the interest in real estate combined with the machinery and business would be willing to pay in order to go into possesion and continue production and avoid all delays, expense, and inconvenience incidental to getting the machinery operating, and which is arrived at by an estimate of the value of attainable future profits of a container business to be operated on the real estate.

B. In holding that a lessee was entitled to claim the reproduction cost of improvements and cost of installing machinery (Exhibit 32, R 248, 567-574) unaccompanied by testimony as to the value of the use, when under the

term of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the remainder of the demised term.

C. In holding that the compensation payable to the respondent by the United States was not limited by the sale clause of the lease.

D. In holding that condemnation by the United States was not within the scope of the condemnation clause.

SUMMARY OF ARGUMENT

POINT A

The Circuit Court of Appeals has construed the decision of this court in the General Motors case, 65 S. Ct. 357, 89 1. ed. 379 as overruling Mitchell v. U. S. 267 U. S. 341, Bothwell v. U. S. 254 U. S. 231, U. S. ex rel T.V.A. v. Powelson, 319 U. S. 266, and long line of cases all to the effect that loss of profits, inconvenience, and consequential damages are not to be compensated for in condemnation.

Gaylord's witnesses fixed the enhancement in the rental value of the leasehold over the amount Gaylord would have had to pay in rent if it had remained on the premises for the unexpired term at $32,843.16 (R 89-92). The total reproduction cost of the improvements added by Gaylord, including the cost of installing the machinery, was $27,-192.12 (Exhibit 32, R 248, 567-574). Assuming the value of the use of the improvements might properly be taken as the total value of such improvements, and cost of installation, the aggregate of such sums and the rental value is $60,035.28. The verdict was for $111,792. (R 538). Thus more than $50,000 is "'ready-to-go" value based upon testimony ascribing a special value to the leasehold by assuming a sale or offering of the lease in combination with the business and equipment of the lessee (which equipment

the lessee was compelled to remove under the lease (R 541)), because the alleged purchaser could immediately produce containers and avoid all delays, expenses and inconvenience incidental to getting the container plant operating. Gaylord has moved its business and has it and all its machinery operating elsewhere. Its only loss, whether characterized as so-called "ready-to-go" value, or good will, is nothing more than that intangible benefit to a business of continuing in its present location and thus avoiding loss of profits, inconvenience and delay, which goes with moving. This court has ruled many times that these losses are not compensable and has re-affirmed this ruling in the General Motors Case, 65 S. Ct. 357, 89 L. ed. 379, 383.

The majority openion of the Circuit Court of Appeals quotes the *General Motors Case* 65 S. Ct. 357, 89 L. ed. 379, and particularly that portion referring to the unusual situation there presented because of the fact that only a portion of the sublease was taken and it was necessary for General Motors to move out and in. The opinion of the Circuit Court of Appeals entirely overlooks the following portions of this Court's decision in the General Motors Case:

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, *the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign.* No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the

Government. We are not to be taken as departing from the rule they have laid down, which we think sound." (Page 383).

"When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress." (page 384) (italics ours).

This court further pointed out (page 384) that the *General Motors Case,* where it was necessary to move out and back as the entire lease was not taken, is entirely different from a situation where the fee or entire lease is taken. In this case the entire fee and entire Gaylord lease was taken. If there is anything in the *General Motors Case* which overrules the long line of authorities of this court that consequential losses are not compensable under the Fifth Amendment, then it is submitted that a question of general importance is presented by the instant case which should be decided by this court. With the possible exception of the General Motors Case as construed in the Eline Case there are no decisions of the Federal Court supporting a so-called "ready-to-go" value or intangible value based on the advantage of avoiding the necessity of moving and interruption of production.

In *Mitchell v. U. S.* 267 U. S. 341, this court denied an owner compensation for the destruction of his business, which resulted from the taking of his land for public project, even though his business could not be re-established elsewhere. See also:

Bothwell v. U. S., 254 U. S. 231 to the same effect. This court had occasion in *U. S. ex rel T.V.A. v. Powelson,*

319 U. S. 266, 281, to review the long line of decisions of this court relating to consequential losses, and there again stated:

> "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. . . . . 'There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.' 267 U. S. p. 345. That which is not 'private property' with-the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not 'taken' in the Mitchell Case it need not be reflected in the award due the landowner unless Congress so provides."

This Court further said (page 282) that "going concern value of the enterprise" is only a part of just compensation where business is taken.

In the *General Motors Case,* 65 S. Ct. 357, 89 1. ed. 379, 383 this court re-affirmed the rule established in the foregoing cases.

Gaylord attributes all the values of the operation of the business to the leasehold and not to the earning power of the machinery, good-will and business management. The machines are set up and operating elsewhere. Gaylord is still in the container business. The fact that Gaylord's business in Milwaukee might have been sold at a profit is not determinative of the value of the leasehold upon which the business is conducted. Certainly there is no warrant for charging Eline's with losses necessary to moving when under the lease Gaylord would have been forced to move at a later date. Whether so-called "ready-to-go" value is applied to a fee taking or leasehold taking it represents the advantage to an owner of continuing in the existing loca-

tion rather than being subjected to the inconvenience of moving. Whatever label is used it is actually a form of recovery for losses and expenses produced by moving. The fact that it is a business loss rather than a value inherent in the real estate is demonstrated by the fact that Gaylord's witnesses as to "ready-to-go" value admitted that if the business was not making money, there would not be a "ready-to-go" value (R 183, 236).

This evidence was received over objection (R 166-168; 177; 183; 217; 227; 287; 289; 291-293). Eline's motion to strike was overruled (R 240, 294, 332). The jury was instructed that the evidence remained in the case (R 531) and was told that if either of such witnesses reached his conclusion as to the value of the leasehold by the capitalization of expected profits, such testimony should be disregarded (R 531).

This instruction taken in connection with the recitation in the charge that these witnesses valued the leasehold on the basis of what another container company would pay for the leasehold with the machinery set up and in place (R 531) invited the jury to base a verdict on this evidence although it was expressly and avowedly based upon a combined sale of leasehold with business and machinery and a capitalization of future potential profits of the plant.

The majority opinion of the Circuit Court of Appeals (R 645) points out that the instructions of the trial court clearly defined the theory of valuation as the difference between the market value of the use for the balance of the term minus rent payable. Eline's has no quarrel with the instruction of the trial court, but the instructions could not cure an award where everything over $60,000 is of necessity based upon so-called "ready-to-go" value. The Circuit Court of Appeals avoided discussing the real issue in the

case—namely, is "ready-to-go" value part of just compensation, but on the basis of the *General Motors Case* held that it was. The majority decision of the Circuit Court of Appeals necessarily holds that "ready-to-go" value may be included as part of just compensation because absent that element of "ready-to-go" value, there is no evidence to support a verdict of more than $60,000.

Eline's entered into an agreement with the Government on the assumption that all the ordinary rules as to limitations of compensable losses applied, but now under the Circuit Court of Appeals decision it has been ruled that such consequential losses are compensable when an entire leasehold is taken. If this decision is a standard for the future, then the same mathematical process can be used on fee property of which the owner is the occupant and upon which he conducts a business. If this decision stands, the United States will be subjected to tremendous claims of a type not heretofore allowable for damages in condemnation cases and all the rules of law laid down by this Court as to limitation of such claims will be circumvented. Indirectly recovery for these losses may be made by using these losses to value a fee or a leasehold, whereas directly they are not compensable under the Fifth Amendment. The effect of such evidence on the cost to the Government of condemning a leasehold is illustrated by a comparison of the award in this case of $111,792 to the Government's appraisal of the Gaylord lease[1] and the undisputed testimony that the value of the building occupied by Gaylord was $112,500 (R 356-359). The total use value of the property for 6 and 2/3 years (about 1/6 of the life of the property)

[1]The Government appraised the Gaylord lease at $40,000, the amount of the sales clause (R. 188). If the Government had appraised the lease on the basis of the present rate "for comparable space" as compared to the rate in the lease, the present rate being "approximately 30 cents a square foot" (R. 188-189; 199-200) the valuation would have been about $24,843.16 (R. 89).

according to the jury's findings would be $111,792 plus the rent of $100,000 or $211,792. In other words, under the jury's findings, the total use value for 1/6 of the life of the property is equal to nearly twice the value of the fee.

POINT B

The decision of Circuit Court of Appeals as to improvements and cost of installing machinery claimed by Lessee is in conflict with other Federal cases, and is an important question of federal law in condemnation which should receive ultimate determination.

Exxhibit 32 (R 248, 567-574) showing reproduction cost of improvements and cost of installing machinery was admitted in evidence over Eline's objection (R 53, 56, 70, 248). Gaylord's own experts admitted they made no attempt to appraise the value of the use of the improvements (R 77, 139, 142). The District Court viewed with doubt the admissibility of this Exhibit 32 (R 52-53, 56, 70, 248, 528, 529).

The Circuit Court of Appeals approved of the admission of this Exhibit 32 because the trial court told the jury to consider it with caution. The jury was therefore allowed to guess as to the use value. The correct instructions by the trial court as to use value could not cure the prejudicial admission of this Exhibit 32, without testimony as to the value of the use.

The decisions all hold that under lease provisions such as in this case the lessee is entitled to only use value as a part of just compensation.

Carlock v. U. S. 53 Fed. (2) 926, 927 (CCA D.C.).
U. S. v. Certain Parcels of Land, 54 Fed. Supp. 561, 562.
Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746.

Fiorini v. Kenosha, 208 Wis. 496, 243 N. W. 761.

If this decision of the Circuit Court is to stand, when the Government condemns an entire leasehold, it will have to pay the reproduction cost of the improvements and the cost of installing machinery by a lessee, because the lessee will claim the entire cost and ignore proving the use value of the improvements during the balance of the term of the lease.

The cost of installing machinery ($9,992.60) is not compensable because it is an item of consequential damage where the entire lease is taken under decisions cited in prior argument.

POINT C

The decision of the Circuit Court of Appeals involves an important question of federal law which should receive ultimate determination.

The sales clause in the lease provides:

> "77. It is further understood and agreed by and between the parties hereto that in the event of a sale of the within leased premises or of the Eline plant property or a portion thereof (of which the within leased premises are a part), lessor reserves and has the right to cancel and terminate this lease to take effect at any time after December 31, 1941, by lessor giving to lessee not less than six months' written notice of such intention so to cancel and terminate. . . ." (R 561).

On the day the petition for condemnation was filed, the District Court entered an order of immediate possession of the unoccupied portion of said premises, and also gave possession of the occupied portion as of April 30, 1942 (R 7). Gaylord was given prompt notice of the condemnation (R 307, 308, 589). On June 16, 1942, Eline's gave the

United States, at its request, a written option to purchase the property pursuant to 50 U.S.C.A. 171. This option was accepted by the Government on August 1, 1942 (R 590-597). The option provided that if the Government did not desire to take title by deed, it might file a declaration of taking, the price in the option in that case to control.

A long line of cases have held that a condemnation is a sale.

American Creameries v. Armour, 149 Wash. 690, 271 Pac. 896.

United States v. Certain Parcels of Land, 51 Fed. Supp. 811.

Vandermulen v. Vandermulen, 108 N.Y. 195, 15 N. E. 383.

Atlanta, Knoxville & Northern R. R. v. So. Ry. Co. (CCA) 131 Fed. 657.

Jackson v. State, 213 N. Y. 34, 106 N. E. 751.

Bell Telephone v. Parker, 187 N. Y. 299, 79 N. E. 1008.

The majority opinion of the Circuit Court of Appeals holds that because the parties failed in the condemnation clause to expressly name the United States, condemnation by the United States could not be a sale within the terms of the sales clause. If the condemnation clause was limited as claimed by the majority opinion, it performs no functions in the case and the sales clause is to be construed as if the condemnation clause were excised from the lease. The two provisions were complementary and meant to exhaustively cover the lessee's interest in the property. There is no conflict or inter-relationship between the condemnation clause and the sales clause. Both may stand without either impinging on the other.

A number of the decisions have held that the option agreement used in this case created a binding vendor-vendee relationship between the government and the property owner.

U. S. v. Scott, 140 Fed. (2) 941 (CCA 8).

Wachovia Bank and Trust Company v. U. S. 98 Fed. (2) 609 (CCA 4).

U. S. v 3.25 *Acres of Land,* 53 Fed. Supp. 884.

In Danforth v. U. S. 308 U. S. 271, 282, this court, speaking of this type of option said:

> "We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioners' interest in land subject to perfecting the title through condemnation."

POINT D

The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meaning of the condemnation clause involves an important question of federal law which should receive ultimate determination.

The condemnation clause (Clause 13) provides:

> "Lessee further agrees that if at any time during the term of this lease the said premises or any part thereof shall be acquired or condemned and/or purchased by any municipality or political subdivision of the state wherein said premises are located, or by any company or corporaton lawfully qualified to exercise the right of eminent domain, the lessor shall have the right to cancel and terminate this lease by giving the sellee not less than 30 days written notice of such intention to cancel * * * *" (R 545).

A long line of cases hold that the United States is a corporation.

U. S. v. Maurice, 109 Fed. Case 15, 747, 2 Brock U. S. 96.

Helvering v. British, American Tobacco Co. 69 Fed (2) 528, 530.

Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 92.

Respublica v. Sweers, 1 U. S. 41, 1 Dall. 41.

Cotton v. U. S., 11 Haw. 229, 231.

Stanley v. Schwalby, 147 U. S. 508, 517.

The decision of the Circuit Court of Appeals to the effect that the United States is not a corporation within the terms of the clause is based principally on *U. S. v. Cooper,* 312 *U.* S. 600. An analysis of the *Cooper Case* and later decisions of the court show that this case does not so hold. The *Cooper Case* involved the construction of the word "person" defined in the Sherman Act as follows:

> "The word 'person or persons' whenever used * * * shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the Laws of any of the territories, the laws of any state or the laws of any foreign country."

All the court held was that under this definition the United States could not be treated as a corporation organized under its own laws and could not exist under itself. (In Clause 13 the word "corporation" is not qualified as in the above definition.) The majority opinion of this court does not deny the corporate status of the Unted States but merely holds that it is not within the class of corporations to whom the benefits of the act were intended to be extended.

This Court had occasion recently in the case of *Parker v. Brown,* 317 U. S. 341, 87 L. ed. 235, 241 to consider the *Cooper Case* in this respect and said:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

> The act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). A state may maintain a suit for damages under it, Georgia v. Evans, 316 U. S. 158, 86 L ed. 1346, 62 S.Ct. 912, but the United States may not, United States v. Cooper Corp. 312 U. S. 600, 85 L. ed. 1071, 61 Sup. Ct. 742—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

In recent case of *State of California v. U. S.*, 320 U. S. 577, 585 this court held that the State of California fell within the term "person" which is defined as "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or Possession thereof or of any foreign country." (46 U. S. C. A. 801). This court pointed out that a different construction "would have such dislocating consequences."

Under the position taken by the Circuit Court of Appeals condemnation exercised through any corporation created either by the United States or the State of Wisconsin would fall within the clause, while a condemnation which was carried on directly by the United States or the State of Wisconsin rather than by a delegated agency or instrumentality would not fall within the clause.

Respectfully submitted,

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